

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN**

PUBLIC INTEREST LEGAL FOUNDATION,

Plaintiff,

v.

JOCELYN BENSON, in her official capacity as
Michigan Secretary of State,

Defendant.

Civ. No. 1:21-cv-929

BRIEF IN SUPPORT OF APPEAL OF ORDER GRANTING MOTION TO QUASH

Plaintiff Public Interest Legal Foundation (“the Foundation”) appeals the ruling of June 14, 2023, Docket Entry No. 102, granting Non-Party Electronic Registration Information Center, Inc.’s (“ERIC’s”) Motion to Quash Subpoena and for a Protective Order pursuant to Fed. R. Civ. P. 72(a) and Local Civil Rule 72.3 and submits this brief in support of its appeal. Preventing discovery against the third party that Defendant concedes does an important and exclusive part of the list maintenance activities for deceased registrants would be fundamentally unfair and undermine the rights to information that is squarely relevant and that the Foundation is entitled to have in discovery. Worse, the order applied the incorrect standard of law to determine whether the Foundation’s requested discovery was relevant. Specifically, the order asked the wrong question. It required the Foundation to first demonstrate defects in the very information the Foundation is seeking to discover, information the Foundation does not yet possess. The order thus sets a standard for discovery that is contrary to the standard set by the Federal Rules and is fundamentally unfair. For this reason, the order should be overruled or modified.

Procedural Background

This action concerns the State of Michigan's program for identifying and removing from the voter rolls registrants who have died. Discovery answers and witness testimony of Defendant Michigan Secretary of State Jocelyn Benson ("Defendant" or "Secretary Benson") and her staff plainly concede that Michigan's program relies on reports created by ERIC showing which registrants should be removed. In other words, ERIC does list maintenance activities that Michigan relies on. The uncontested record demonstrates that ERIC's reports constitute the *only* direct comparison between Michigan's voter roll (called the QVF) and the Social Security Administration's death records. *See* ECF No. 86-1, PageID 1414-16. It is undisputed that ERIC plays a vital and *exclusive* role in Michigan's voter list maintenance program. That makes the third-party discovery relevant in the extreme.

Accordingly, the Foundation served the subpoena at issue on non-party ERIC, a Delaware Corporation, requesting a deposition of the organization pursuant to Federal Rule of Civil Procedure 30(b)(6) and the production of documents. ERIC moved to quash the subpoena in the District of Delaware. *See* ECF No. 80, PageID 854-855. The Foundation responded, *see* ECF No. 94, PageID 1511-35, and then the case was transferred to this Court. *See* ECF Nos. 87-88, PageID 1454-57.

A hearing was held on the motion to quash on June 14, 2023, and an order was issued granting the motion that same day, ECF No. 102. Findings were articulated at the hearing, and the transcript is included in the record at ECF No. 108. The relevant findings are as follows:

- There was nothing in the record to indicate that ERIC's reports were "incorrect or unreliable," or that ERIC was providing data that was "not reliable and should not

be relied on by Michigan,” ECF No. 108, Page ID 1978; therefore, discovery would be inappropriate, as it would not “be proportional to the litigation,” Page ID 1979.

- Additionally, the “breadth of the subpoena” was overbroad and not wholly relevant to the case. ECF No. 108, Page ID 1979-1980.

Standard of Review

“[A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court,” with certain exceptions. 28 U.S.C. § 636(b)(1)(A). However, a judge of the court, in turn, “may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.” *Id.* See also Fed. R. Civ. P. 72(a); W.D. Mich. L. Civ. R. 72.3(a); *King v. Curtis*, 2015 U.S. Dist. LEXIS 195130, *5-6, 2015 WL 13838477. A factual finding is “clearly erroneous” when, “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). “An order is ‘contrary to the law’ when it ‘fails to apply or misapplies relevant statutes, case law, or rules of procedure.’” *Bisig v. Time Warner Cable, Inc.*, 940 F.3d 205, 219 (6th Cir. 2019) (citation omitted).

When dealing with discovery disputes, “the scope of discovery is within the sound discretion of the trial court.” *Lavado v. Keohane*, 992 F.2d 601, 604 (6th Cir. 1993). “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1). See also 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2459 (3d ed. 1998) (“Although a subpoena may be quashed if it calls for clearly irrelevant matter, the district judge

need not pass on the admissibility of the documents sought in advance of trial nor quash a subpoena demanding their production if there is any ground on which they might be relevant.”).

A subpoena may be quashed if it subjects a person to undue burden, Fed. R. Civ. P. 45(d)(3)(A)(iv), and can be quashed if it requires “(i) disclosing a trade secret or other confidential research, development, or commercial information; or (ii) disclosing an unretained expert’s opinion or information,” Fed. R. Civ. P. 45(d)(3)(B). None of these circumstances exist here. “Undue burden is to be assessed in a case-specific manner considering such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.” *New Prods. Corp. v. Dickinson Wright PLLC (In re Modern Plastics Corp.)*, 890 F.3d 244, 251 (6th Cir. 2018) (internal quotations removed).

Review of a motion to quash a non-party subpoena involves two steps. First, the non-party moving party has “the initial burden of establishing grounds for quashing the subpoena.” *Klingeman v. DeChristofaro*, Case No. 4:09-cv-528, 2010 U.S. Dist. LEXIS 98546, *5 (N.D. Ohio 2010). Once that burden has been met, the party issuing the subpoena must “show relevance and a need for the information.” *Id.*

Argument

I. The Order Quashing the Foundations’ Subpoena is Squarely Contrary to the Relevance Standard Under the Federal Rules.

The Federal Rules of Civil Procedure authorize “extremely broad” discovery. *United States v. Leggett & Platt*, 542 F.2d 655, 657 (6th Cir. 1976). The default rule is the Foundation “may, by oral questions, depose any person, including a party, without leave of court except as provided in Rule 30(a)(2).” Fed. R. Civ. P. 30(a)(1). In any such deposition, the Foundation “may obtain

discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(a)(1).

"Evidence is 'relevant' if its existence simply has some 'tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *United States v. Jones*, 566 F.3d 353, 364 (3d Cir. 2009) (quoting Fed. R. Evid. 401). "[T]his standard of relevancy is liberal." *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 905 (6th Cir. 2006) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 587 (1993)).

The "heavy" burden is on ERIC to demonstrate that the subpoena should nevertheless be quashed. *CH Holding Co. v. Miller Parking Co.*, 2013 U.S. Dist. LEXIS 120541, at *7 (E.D. Mich. Aug. 26, 2013) ("The party seeking to quash a subpoena bears a heavy burden of proof."); *see also Ramos v. Walmart, Inc.*, 2023 U.S. Dist. LEXIS 34786, at *4 (D.N.J. Mar. 2, 2023) ("A party moving to quash a subpoena bears the burden of demonstrating that termination of an otherwise valid subpoena is warranted on one of the grounds set forth in Rule 45(d)(3).").

The order required the Foundation to demonstrate an issue going to the heart of the case—namely that ERIC's list maintenance activities are inadequate or unreliable. This turns the Rules of discovery upside down. The order required the Foundation to first show that there are defects in ERIC's process used to identify deceased registrants or defects in the reports ERIC provides to Michigan. This puts the cart before the horse, especially when the horse is a central issue in this case (whether list maintenance processes are adequate under the NVRA). Michigan outsources sovereign functions to ERIC to help identify deceased registrants.

It is undisputed that the Foundation may conduct discovery against the Defendant over the very same issues—whether the identification process is adequate. Outsourcing the sovereign

process to a third party cannot immunize that third party from discovery in a case related to the sovereign's compliance with federal law.

Meanwhile Michigan appears to be overlooking thousands of registrants who may have died, as alleged in the Complaint. The Foundation is seeking discovery from ERIC so that it can evaluate Michigan's compliance with Federal law. In other words, discovery is necessary to identify what ERIC is doing. To require that defects in ERIC's processes be identified *before* discovery may proceed here sets the bar for relevance above where the Federal Rules have set it,¹ especially in a circumstance where a sovereign outsources a sovereign function.

The Foundation has attempted to gather facts about ERIC from Michigan. Surprisingly, discovery has yielded the unexpected circumstance where even the Defendant doesn't seem to know what ERIC is doing. The Michigan Director of Elections and current ERIC Chairman of the Board was unable to answer questions when asked in deposition how ERIC conducts list maintenance activities. ECF No. 86-1, PageID 1417-1422. *See also* ECF No. 86-1, PageID 1441. More ridiculous, both Defendant and ERIC have refused to provide reports Michigan receives from ERIC that are less than three years old. These reports are central to the ultimate issues in this case. The Foundation has conferenced with Defendant in an attempt to resolve this dispute, but Defendant's counsel has thus far maintained that Defendant will not produce the ERIC reports that are less than three years old. The Foundation stands little chance of making the threshold showing the order requires if the Foundation is denied access to basic list maintenance documents.

¹ The Foundation acknowledges that the Federal Rules, under amendments made in 2015, also require discovery to be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Relevancy and proportionality, however, remain two distinct requirements and inquiries. *See id.* Given ERIC's relevancy to this litigation, the Foundation has a need to discover facts from ERIC to prepare for trial. One Rule 30(b)(6) deposition is eminently proportional to this need.

II. Discovery upon ERIC Is Relevant and Proportional to this Litigation.

The Defendant has made ERIC relevant to this action. The Foundation alleges that Michigan's list maintenance activities as to deceased registrants are not reasonable. Michigan has explained that its list maintenance activities include the canceling of voter registration records based on information Michigan receives from ERIC. On February 9, 2023, Secretary Benson served her responses to the Foundation's First Set of Interrogatories, which included a response to the following interrogatory:

INTERROGATORY NO. 1: Describe your process for identifying deceased registrations on the State of Michigan's Qualified Voter File, including the frequency, steps taken, and individuals responsible for each step.

ECF No. 86-1, PageID 1424. In relevant part, Secretary Benson responded:

Finally, the Bureau of Elections (BOE) receives a file via a secure file transfer of potentially deceased records from the ERIC program. BOE staff supervised by Rachel Clone, Data and Programs Unit Manager, performs a manual review to determine whether a record matches and updates the voter's registration to "Canceled – Deceased" if not already done in the update above. Procedures are attached for additional information.

Id. at 1425-26.

ERIC's role in Michigan's list maintenance program was also described in Interrogatory No. 7.

INTERROGATORY NO. 7: Identify all information that you receive on a recurring basis regarding individuals who are or may be deceased including the scope of the information and frequency received.

ANSWER: CARS [(Michigan's driver file)] receives information from the Social Security Administration and DHHS, on average, weekly. The relevant pieces of information CARS receives from those sources are the full name, suffix (if any), address, city, state, zip code, date of birth, date of death, social security number. Additionally, BOE receives a report from ERIC every 2 months. The relevant information received includes the level of voter match (what ERIC matched to the QVF such as the voter's name, DLN, DOB, last four of SSN), voter name, registration address, voter mailing address (if any), voter history (last election voted in), date of registration, and date of death.

Id. at 1427-28.

The Foundation has taken the depositions of several Michigan Department of State employees. They concede that ERIC plays a central and fundamental role in Secretary Benson's list maintenance program and the identification of registrants on the active rolls who have died. *See* ECF 86-1, PageID 1433:1-3 (Shelly Belton Dep.) ("The Bureau of Elections receives a report from the Electronic Registration Information Center of possible deceased voters in the State of Michigan") and 1434:13-15 ("Q. So the information from ERIC is sufficient, sufficient grounds for removal of a registrant as deceased? A. Yes."); ECF 86-1, PageID 1437:18-24 (Rachel Clone Dep.) ("[W]e are a member of the ERIC organization, and they send us information on matches for possibly deceased voters in Michigan, and we review those. So that would be the only other, outside of from the driver file, the only other incoming deceased information would be from the ERIC organization."); ECF 86-1, PageID 1440:5 (Stuart Talsma Dep.) ("We get deceased records from ERIC."). ERIC is the "only other" source of information in the entire statewide list maintenance program apart from changes to the driver's license database file. It is hard to imagine how ERIC's procedures, processes, capabilities, and most of all, competence, could be more central to the issues at the heart of this case.

"Most courts agree with the proposition that 'quashing a subpoena and the complete prohibition of a deposition are certainly extraordinary measures which should be resorted to only in rare occasions.'" *Williams v. Wellston City Sch. Dist.*, No. 2:09-cv-566, 2010 U.S. Dist. LEXIS 122796, at *8 (S.D. Ohio Nov. 2, 2010) (quoting *Alexander v. Federal Bureau of Investigation*, 186 F.R.D. 60, 64 (D.D.C. 1998)). There is nothing extraordinary or rare about these circumstances or the deponent. ERIC exists to provide list maintenance services for a state to maintain the voter roll accurately. ERIC identifies registrants on the active rolls who have died. Michigan relies on

ERIC to comply with federal law. Michigan's Director of Elections even serves as the chair of ERIC's board. What ERIC is or is not doing is a relevant and important issue in this lawsuit.

III. ERIC Did Not Demonstrate That Compliance Will Impose Any Burden, Much Less an Undue Burden.

“If the subpoenaed nonparty ... asserts that disclosure would subject it to undue burden under Rule 45(d)(3)(A), it must show that disclosure will cause it a ‘clearly defined and serious injury.’” *State Farm Mut. Auto. Ins. Co. v. Warren Chiropractic & Rehab Clinic, P.C.*, 315 F.R.D. 220, 224 (E.D. Mich. 2016) (quoting *In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. 234, 239 (E.D. Pa. 2014)). ERIC “must specifically establish the nature of any alleged burden, usually by affidavit or other reliable evidence.” *Nolan, L.L.C. v. TDC Int'l Corp.*, 2007 U.S. Dist. LEXIS 75554, at *11 (E.D. Mich. Oct. 11, 2007) (citations and quotations omitted).

ERIC is doing the work of the sovereign here to conduct list maintenance. ERIC has made no showing that compliance with the subpoena would impose any measurable burden on ERIC, much less a burden commensurate with the weighty public issues in this case. Simply put, ERIC has not satisfied its exceptionally high burden. At best, ERIC asserts a blanket relevance objection, which if allowed, would unfairly and perhaps fatally undermine the Foundation's case. Some burden is inherent in all discovery demands. ERIC has chosen to be in the list maintenance game, and that choice carries consequence. A burden objection is therefore only valid when the burden is specific, serious, and substantiated by affidavit. ERIC has not made such a showing.

The Foundation previously set the challenged deposition at a location in Delaware, where ERIC is incorporated. To minimize any burden, the Foundation is willing to hold the deposition *anywhere* and at *any time* within the discovery deadline, ERIC prefers within the United States.

Conclusion

For these reasons, the order granting the motion to quash should be reversed.

Respectfully submitted,

/s/ Kaylan Phillips

Kaylan Phillips

J. Christian Adams

Charlotte M. Davis

Noel Johnson

Joseph Nixon

Public Interest Legal Foundation

107 S. West Street, Suite 700

Alexandria, VA 22314

Telephone: 703-745-5870

kphillips@publicinterestlegal.org

adams@publicinterestlegal.org

cdavis@publicinterestlegal.org

njohnson@publicinterestlegal.org

jnixon@publicinterestlegal.org

Dated: June 28, 2023

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 72.3(a), I hereby certify that the foregoing brief is 2,776 words and does not exceed the limit set forth in Local Civil Rule 7.3 of 4,300 words. Microsoft Word was used to generate the word count.

Dated: June 28, 2023

/s/ Kaylan Phillips
Kaylan Phillips
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to each ECF participant.

Dated: June 28, 2023

/s/ Kaylan Phillips
Kaylan Phillips
Counsel for Plaintiff